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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. COBY BIF LIVESAY, Defendant and Appellant.	H032245 (Santa Cruz County Super. Ct. No. CR6754)

On February 25, 1993, defendant Coby Bif Livesay pleaded guilty to a felony violation of Penal Code section 496 [receiving stolen property].[1] He was placed on three years probation on April 28, 1993. On December 29, 2006, defendant filed a motion to reduce the offense to a misdemeanor. (§ 17, subd. (b) (hereafter 17(b).) The trial court granted the motion on January 19, 2007, but reconsidered its ruling and denied the motion at the request of the prosecutor on October 23, 2007.

On appeal, defendant contends that the trial court acted in excess of its jurisdiction when it reconsidered its ruling on his section 17(b) motion. Alternatively, defendant contends that the trial court erred in granting the motion because the prosecutor failed to establish that the motion constituted an intentional fraud on the court. As we find that the

[1] Further unspecified statutory references are to the Penal Code.

court could properly reconsider it prior ruling, and that the court did not abuse its discretion by denying defendant's section 17(b) motion, we will affirm the trial court's order.

BACKGROUND

On February 25, 1993, defendant pleaded guilty to a felony violation of section 496 [receiving stolen property] in this case. The court placed defendant on three years formal probation with various terms and conditions on April 28, 1993. Defendant was represented by attorney Wesley Schroeder both at the time he entered his plea and when the court granted him probation.

On May 3, 2000, defendant pleaded no contest to a misdemeanor violation of section 647, subdivision (h) [loitering]. The court suspended imposition of sentence and released defendant on a 12-month conditional sentence. (*People v. Livesay* (Super. Ct. Santa Cruz County, 2000, No. M00230.) Schroeder also represented defendant in that case. On July 10, 2000, defendant pleaded no contest to a misdemeanor violation of Vehicle Code section 23152, subdivision (a) [DUI]. The court suspended imposition of sentence and released defendant on a 60-month conditional sentence. (*People v. Livesay* (Super. Ct. Santa Cruz County, 2000, No. M02119.) Defendant was represented by attorney Gallardo, a public defender, in that case.

Defendant was charged by information filed August 10, 2005, in Delaware County, Oklahoma, with two felony counts of shooting with the intent to kill (Okla. Stats. tit. 21, § 652(A)). A supplemental information filed in the same court on November 10, 2005, alleged that defendant had a prior felony conviction, the 1993 conviction in this case.

On December 29, 2006, Schroeder filed a motion in the trial court in this case to reduce defendant's 1993 felony conviction to a misdemeanor. (§ 17(b).) The motion stated in part: "The sentence and probation ordered in his case were completed without incident. Nearly fourteen years have elapsed since the event resulting in conviction in

this case. Since that time there have been no convictions in criminal cases." Defendant was not present at the January 19, 2007 hearing on the motion, but was represented by Schroeder. At the hearing, the prosecutor stated: "Your Honor, I've had an opportunity to review the original presentence report on that case and we weren't able to locate[o]ur file[.] I have no objection. It's 1993." The court stated that it did not have the file either, and asked what the charge was. The prosecutor responded that it was "a 496. He was driving a stolen vehicle." The court responded: "All right. The motion is granted."

On August 10, 2007, the prosecutor filed a request to calendar the matter for "Reconsideration of 17(b) motion granted in January 2007 following a misrepresentation by Defendant and his attorney specifically that the Defendant had remained free from any criminal offenses when in fact he is pending trial in Oklahoma for shooting two police officers and was out on bail when the 17(b) motion was made." The court placed the matter on calendar for August 24, 2007.

On August 23, 2007, the prosecutor submitted[2] a motion for reconsideration of defendant's section 17(b) motion, contending that the court granted the section 17(b) motion "without being presented with all of the material facts. The defense attorney intentionally [misled] the court [through] false statements and concealing material facts." In support of this claim, the prosecutor alleged that defendant had a 1999 Santa Cruz County misdemeanor conviction for violating section 647, subdivision (h); a 2000 Santa Cruz County misdemeanor conviction for DUI; and pending Oklahoma felony charges for shooting two police officers. The prosecutor further alleged that she had "a good faith basis to believe that the defense attorney had actual or constructive knowledge of the crimes committed, arrest and charges regarding the defendant in Oklahoma." The motion was served on Schroeder. Defendant was not present at the scheduled August 24, 2007

[2] Both the prosecutor's August 23, 2007 motion, and defendant's September 17, 2007 motion, were stamped "received" but not "filed."

hearing, but was represented by attorney Daniel Olmos. The court continued the matter to September 18, 2007.

On September 17, 2007, Olmos submitted a motion to strike or deny the motion for reconsideration of defendant's section 17(b) motion because it was not served on Olmos. Alternatively, Olmos requested a continuance of the scheduled hearing. The record on appeal indicates that defendant was present with Olmos at the September 18, 2007 hearing, and that the court granted the defense request for a continuance.[3]

On October 4, 2007, Olmos filed opposition to the prosecutor's motion for reconsideration. Counsel argued that the court lacked jurisdiction to grant the motion for reconsideration, that the prosecutor waived any right to challenge the court's ruling by failing to oppose it or to appeal it, that Schroeder had no affirmative duty to inform the court of defendant's pending charges, and that there was no evidence that Schroeder knew or had reason to know that defendant suffered misdemeanor convictions in 1999 and 2000. Alternatively, counsel argued that the court should deny the motion for reconsideration because it was never served on counsel. The prosecutor filed a "response" to defendant's opposition to the motion for reconsideration on October 5, 2007, and a "reply" on October 10, 2007. In the reply, the prosecutor alleged that, in addition to the two 2000 misdemeanor convictions in Santa Cruz County, defendant had two 2001 drug-related misdemeanor convictions in the state of Missouri.

Defendant was not present at the October 23, 2007 hearing on the motion for reconsideration, but was represented by Olmos and attorney Tom Nolan. The court ruled in relevant part as follows.

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[3] In the opening brief, appellate counsel states, without citation to the record, that defendant has been residing in a secured psychiatric facility in Oklahoma since at least August 2007. None of the documents in the record on appeal, and none of the briefs or other papers filed in this court, have been served on defendant, although defendant appears to have signed a substitution of counsel filed in this court.

"[T]his is the Court's ruling on this matter. I'm satisfied that the motion that was submitted – I think it was actually December of last year – in any case, it was ruled upon January of this year was a fraud on the Court that was intentional.[4]

"It's a little awkward in that the motion probably would have been granted if the motion had been candidly filed; that is, disclosing the misdemeanor 14601 or DUI, whatever it was here, in Santa Cruz County back some years ago and, reading between the lines, probably also was a disclosure of the misdemeanor narcotics-related conviction which apparently happened in Missouri I think in 2000 as I recall is what the papers said, something in that context.

"As a practical matter, the Court probably would have granted the motion anyway. It's difficult to speculate on that but probably would have granted the motion anyway. But this is a fraud on the Court, and the Court's been asked to reconsider the motion

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[4] On April 18, 2008, defendant's appellate counsel filed a motion in this court to introduce evidence on appeal, that evidence being a declaration signed by Schroeder. The declaration states in pertinent part: "6. In my memorandum of points and authorities in support of the [section 17] motion, I stated that, 'Nearly fourteen years have elapsed since the event resulting in conviction in this case. Since that time there have been no convictions in criminal cases. [¶] 7. In making that statement, it was never my intention to fraudulently deceive the court or gain some unfair advantage through trickery or deceit. I have done enough of these section 17 motions to know that the district attorney and/or probation officer opposing the motion will be prepared to challenge the slightest misrepresentation of fact or law. [¶] 8. At the time I made that statement I had simply forgotten about appellant's then over six year old misdemeanor loitering conviction. Also, as a private attorney, I had no access to a data base which would contain appellant's updated criminal history. It was an honest mistake of fact that I regret."

This court granted the motion on May 14, 2008, after no opposition was filed. On September 9, 2008, the Attorney General filed a motion to strike the declaration and, on September 23, 2008, defendant's counsel filed opposition to the motion to strike. The motion to strike was held for consideration with the merits of the appeal, and we now grant the motion. The declaration is inadmissible hearsay (Evid. Code, § 1200), it was not before the trial court when it made its ruling and it is not determinative of the question presented on appeal. (*People v. Stowell* (1956) 139 Cal.App.2d 728, 731.)

having this come to light, and at this point I think it's appropriate for the Court to review all of the available information, what little there is, about Mr. Livesay and his conduct which would allow the Court to take into consideration the situation in Oklahoma.

"I do not think he had any affirmative obligation to disclose that information, and the declaration that was filed did not say something to the effect that there's nothing pending. It said there were no convictions. And I don't think, again, he has an obligation to disclose the circumstance he found himself in.

"But again, going back and reconsidering the motion in light of the misrepresentations that were made to the Court, the Court's entitled to take everything into consideration, including his circumstance in Oklahoma. So it's my intention to reconsider the prior ruling and deny it. Deny the motion."

When Nolan argued that there was no fraud, as the section 17(b) motion put the prosecutor on notice that there needed to be a records-check in the county, the court responded: "Not a fraud on the district attorney's office. The Court was addressing fraud on the Court." When Nolan asked the court, "And the Court does find jurisdiction?" The court responded, "I don't think the Court ever loses jurisdiction in a criminal matter." The court also stated that it was denying Nolan's request to stay the court's order pending appeal.

DISCUSSION

"When a crime is punishable, in the discretion of the court, by imprisonment in the state prison or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances: [¶] . . . [¶] (3) When the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor." (§ 17(b).) Thus, under section 17(b), "[e]ither the court may declare the offense to be a misdemeanor at the time of granting

probation or it may do so on application of the defendant or the probation officer thereafter." (*People v. Wood* (1998) 62 Cal.App.4th 1262, 1267.)

"[S]ection 17(b), read in conjunction with the relevant charging statute, rests the decision whether to reduce a wobbler solely 'in the discretion of the court.' " (*People v. Superior Court* (*Alvarez*) 14 Cal.4th 968, 977.) " '[A]ll exercises of legal discretion must be grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue.' [Citation.]" (*Ibid*.) "[E]ven under the broad authority conferred by section 17(b), a determination made outside the perimeters drawn by individualized consideration of the offense, the offender, and the public interest 'exceeds the bounds of reason.' [Citation.]" (*Id*. at p. 978.)

On appeal, the burden is on the party attacking the trial court's ruling to clearly show that the court's decision was irrational or arbitrary. " 'In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate . . . objectives and its discretionary determination . . . will not be set aside on review.' [Citation.] Concomitantly, '[a] decision will not be reversed merely because reasonable people might disagree. "An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge." [Citations.]' [Citation.]" (*Alvarez, supra*, 14 Cal.4th at pp. 977-978.)

In this case, there is no question that the court had jurisdiction to consider defendant's section 17(b) motion, even though it was brought over 13 years after his 1993 conviction and order granting him probation. The court granted the section 17(b) motion in January 2007, but then reconsidered and denied the motion at the request of the prosecutor after the time to appeal from the order expired. In this court, defendant first contends that the trial court acted in excess of its jurisdiction when it reconsidered its ruling. In his opening brief he argues that, "absent express statutory language so permitting, criminal courts lack jurisdiction to reconsider rulings that affect the substantial rights of a [criminal] defendant, even if they later believe them to be

erroneous." He further argues that the prosecution waived any right to seek reconsideration by failing to oppose the motion, and that, even if the court had jurisdiction to reconsider its ruling, it erred by granting the motion because the prosecution did not carry its burden of showing that the motion was an intentional fraud on the court. In a supplemental opening brief, filed with leave of court, defendant argues that, although a court may vacate a judgment "obtained through extrinsic fraud," the prosecutor failed to carry its burden of showing that the order on the section 17(b) motion was obtained through extrinsic fraud.

The Attorney General argues that defendant is estopped from claiming that the court acted in excess of its jurisdiction when it reconsidered the section 17(b) motion because he deceived the court into granting the motion. The Attorney General further argues that, regardless, the court had jurisdiction to reconsider its ruling because it was procured by fraud. Lastly, the Attorney General argues that there is substantial evidence to support the court's finding that defendant defrauded the court.

It has long been understood that a final criminal judgment or order "may be subject to the inherent power of the court to vacate where procured by fraud." (*Marler v. Municipal Court* (1980) 110 Cal.App.3d 155, 162; see also *Smith v. Superior Court* (1981) 115 Cal.App.3d 285, 287, 292, fn. 3; *People v. Haskins* (1985) 171 Cal.App.3d 344, 350; *People v. Mikhail* (1993) 13 Cal.App.4th 846, 858.) "A trial court has jurisdiction to correct an erroneous sentence . . . if the sentence was induced by fraud . . . ." (*People v. Jack* (1989) 213 Cal.App.3d 913, 915-916, citing *Smith v. Superior Court, supra,* 115 Cal.App.3d at p. 287.)

In *People v. Malveaux* (1996) 50 Cal.App.4th 1425, the trial court vacated a juvenile court judgment after it learned that the defendant was probably 26, not 17, when he committed the offenses at issue. The defendant was then tried and convicted in adult court. The appellate court found, in part, that double jeopardy did not bar the retrial. "A defendant cannot prevent a second trial where it can be determined from the record that

defendant intentionally committed fraud on the court in securing the first conviction. [Citation.] The United States Supreme Court has recognized [that] courts have an inherent ability to correct judgments obtained through fraud or intentional misrepresentation. (*Hazel-Atlas Glass Co. v. Hartford-Empire Co*. (1944) 322 U.S. 238, 248.) The United States Court of Appeals for the Seventh Circuit, using the rationale developed in *Hazel-Atlas*, held that the district court had the inherent power to vacate a criminal sentence obtained through fraud or misrepresentation. (*United States v. Bishop* (7th Cir. 1985) 774 F.2d 771, 774.) The *Bishop* court went on to state, '. . . the defendant's action in intentionally deceiving the court strikes at the very heart and foundation of the American system of justice. If a defendant, . . . , intentionally commits a fraud upon the court by providing the court with erroneous information that the court relies upon, . . . he certainly must bear the consequences of his fraudulent and deceitful actions.' [Citation.]" (*People v. Malveaux, supra*, 50 Cal.App. 4th at pp. 1440-1441, fn. omitted.) "The perpetration of fraud on the court must be affirmative actions taken on the part of the defendant. The prosecution cannot use this exception to the bar against double jeopardy to get subsequent attempts at convicting defendant due to trial errors that could have been corrected in a timely manner." (*Id*. at p. 1441.)

Defendant cites *In re Candelario* (1970) 3 Cal.3d 702, *Madril v. Superior Court* (1975) 15 Cal.3d 73, and *People v. McGee* (1991) 232 Cal.App.3d 620, for the proposition that it is judicial error, and thus an act in excess of the court's jurisdiction, for a criminal court to reevaluate the basis for its earlier ruling. However, these cases are distinguishable from the case before us. In *Candelario*, the trial court amended an abstract of judgment over one month after sentencing to add a finding on a prior conviction, which the defendant had earlier admitted, even though the prior conviction finding was not mentioned by the court when it sentenced the defendant. Our Supreme Court found that, because the failure to include the prior enhancement in the defendant's sentence was due to judicial error, the trial court lacked jurisdiction to amend the abstract

of judgment to add the finding on the prior and to thereby enhance the defendant's sentence. (*In re Candelario, supra,* 3 Cal.3d at p. 705.) In *Madril,* the trial court granted a defendant's suppression motion, but then reconsidered and denied it at the request of the prosecutor prior to trial. Our Supreme Court held that the language of section 1538.5 deprived the trial court of jurisdiction to reconsider a suppression motion unless the People, pursuant to subdivision (j) of that section, sought to reopen the matter at trial upon a showing of good cause. (*Madril v. Superior Court, supra,* 15 Cal.3d at pp. 77-78.) In *McGee,* the trial court reconsidered and vacated its earlier ruling setting aside the defendant's guilty plea. The appellate court held that a trial court may not reinstate a guilty plea without the defendant's acquiescence. (*People v. McGee, supra,* 232 Cal.App.3d at p. 622.)

Citing *City and County of San Francisco v. Cartagena* (1995) 35 Cal.App.4th 1061, 1066-1069, defendant contends that the inherent power of the court to reconsider its rulings due to "fraud on the court" applies only when extrinsic fraud, as opposed to intrinsic fraud, has been shown. "Extrinsic fraud occurs when a party is deprived of the opportunity to present his claim or defense to the court; . . ." (*Id*. at p. 1067.) "By contrast, fraud is intrinsic and not a valid ground for setting aside a judgment when the party has been given notice of the action and has had an opportunity to present his case and to protect himself from any mistake or fraud of his adversary but has unreasonably neglected to do so." (*Ibid*.) The court in *People v. Malveaux, supra,* 50 Cal.App.4th at page 1443, footnote 11, "rejected[d] this distinction between intrinsic and extrinsic fraud for purposes of defining a 'fraud on the court.' " (See also *id*. at p. 1441, fn. 9.) We agree with the *Malveaux* court, and refuse to draw a distinction between intrinsic and extrinsic fraud for the purposes of determining what constitutes fraud on the court.

In this case, the defendant submitted a section 17(b) motion that stated, in part, that defendant did not have any criminal convictions since the 1993 conviction at issue. The court relied on that statement when it granted the motion. Thereafter, the prosecutor

presented evidence that defendant's section 17(b) motion included erroneous information: defendant had subsequent criminal convictions in the same court and the attorney who represented defendant in 1993 and who filed the 17(b) motion also represented defendant before the court when he pleaded guilty in 2000 to a misdemeanor offense. Based on this evidence, on which defendant intended the court to rely and on which the court did rely, the court could properly vacate and reconsider its ruling.

In addition to the evidence of defendant's subsequent convictions in the same county, the prosecutor presented evidence that defendant had serious pending charges in the state of Oklahoma and the 1993 conviction was alleged as a prior felony conviction in that matter. The prosecutor also alleged, and defendant's counsel did not dispute, that defendant had two drug-related convictions in Missouri. Although the court found that defendant was under no obligation to inform the court of the pending Oklahoma charges in the section 17(b) motion, once the court learned of the charges it could properly consider them along with all of defendant's prior convictions in determining whether it was appropriate to grant the section 17(b) motion.

It is defendant's burden to show that the court's decision to deny the motion was irrational or arbitrary. (*Alvarez*, *supra*, 14 Cal.4th at p. 977.) On the record before us, we cannot say that the court's ruling denying defendant's section 17(b) motion exceeds the bounds of reason. The record indicates that, since his 1993 felony conviction in this case, defendant has had two misdemeanor convictions in 2000 in the same county, two misdemeanor convictions in 2001 in Missouri, and two recent serious felony charges in Oklahoma. Thus, the grant of probation in this case did not encourage defendant to lead a law-abiding life or deter him from future offenses. (See Cal. Rules of Court, rule 4.410(a)(3).) We will not substitute our judgment for the judgment of the trial court. (*Alvarez*, *supra*, 14 Cal.4th at pp. 977-978.)

DISPOSITION

The October 23, 2007 order denying defendant's Penal Code section 17, subdivision (b) motion is affirmed.

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BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

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MCADAMS, J.

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DUFFY, J.